UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Midwest Independent Transmission System Operator, Inc.	**)**	**Docket Nos. ER02-2033-000, ER02-2033-001**
American Transmission Company LLC	**)**	

COMMENTS OF THE ILLINOIS COMMERCE COMMISSION

Pursuant to Rule 211 of the Commission's Rules of Practice and Procedure, 18 C.F.R. §385.211, the Illinois Commerce Commission ("ICC") hereby submits its comments in the above-captioned proceeding in response to a joint filing submitted by the Midwest Independent Transmission System Operator, Inc. ("Midwest ISO") and American Transmission Company LLC ("ATCLLC") (collectively, "Applicants"), on June 5, 2002 ("June 5th filing"). The ICC recommends that the Commission deny the Applicants' proposal for the reasons discussed herein.

I. BACKGROUND

On June 5, 2002, the Applicants submitted proposed revisions to the Midwest ISO Open Access Transmission Tariff ("OATT"), which would limit the liability of both the Midwest ISO and the Midwest ISO Transmission Owners for damages related to services provided under the Midwest ISO OATT, including interruptions, deficiencies or imperfections of service.[1]

[1] Transmittal Letter, at 1

The Applicants request that the Commission reverse its current policy on service liability limitation. Rather, the Applicants request that FERC step in and adopt specific liability limitation provisions for both the Midwest ISO and the Midwest ISO transmission-owning members. If the Applicants' filing is approved, the Midwest ISO and the Midwest ISO Transmission Owners would effectively escape liability for all but the direct consequences of their own gross negligence or intentional misconduct surrounding any actions associated with service provided under the MISO OATT.

The Applicants have requested an effective date of August 5, 2002 for their proposed Midwest ISO OATT revisions.[2] The Commission issued a notice of the Applicants' filing on June 12, wherein the deadline for comments was set at June 26, 2002. On June 25, 2002, the Applicants filed an errata to their June 5th filing. The ICC filed a notice of intervention on June 26. On June 27, 2002, the Commission issued a notice establishing July 9, 2002, as the deadline for filing comments.

II. ICC POSITION AND RECOMMENDATION

The ICC believes that the proposed change in the service liability standard and oversight would interfere with the established framework of deferring to state oversight of this issue.[3] The ICC further believes that the proposed changes would contradict the Commission's goals of Order No. 2000 to promote efficiency in wholesale electricity markets and to ensure that electricity consumers pay the lowest price possible for reliable service.[4]

Specifically, the ICC recommends that the Commission deny the Applicants' filing for the following reasons:

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[2] *Id.,* at 1

[3] *See*, *Transmission Access Policy Study Group v. FERC*, 225 F.3d 667, at 727-728 (D.C. Cir. 2000), *aff'd* 122 S. Ct. 1012 (2002).

[4] *Regional Transmission Organizations*, Order No. 2000, 89 FERC ¶ 61,285 (1999), at 1.

(1) The electric industry restructuring changes cited by Applicants do not merit changing the current regulatory framework concerning service interruption liability;
(2) The proposed changes to the Midwest OATT provide excessive limits on the Transmission Owners' liability;
(3) Any proposed change to the liability standard must be evaluated in conjunction with established service delivery reliability standards, and Applicants have not addressed delivery reliability standards in their June 5th filing; and
(4) Even assuming the Commission did have authority over this issue, any proposed change to the liability standard within an RTO framework would be more properly addressed in a generic rulemaking proceeding, rather than in the Midwest ISO case-specific context.

III. DISCUSSION

A. The Electric Industry Restructuring Changes Cited By Applicants Do Not Merit Changing The Current Regulatory Framework Concerning Service Interruption Liability.

Applicants argue that industry restructuring changes have caused changes to the locus of service interruption liability and that the Commission must now exercise authority in this area. The ICC disagrees. Approval of the Applicants' proposal would represent a substantial departure from the provisions approved for use in tariffs by the Commission, as well as the Commission's long-standing policy that liability limitations with respect to claims of third parties should be a matter of state law.[5] In affirming Order No. 888, the United States Court of Appeals upheld this policy. The Court agreed that "[FERC's] indemnification provision does not preclude the states from shielding utilities from liability for ordinary negligence. States did so before, through both their regulatory commissions and their courts, and they remain free to do so under Order 888."[6] In *GridFlorida LLC et al*,[7] the Commission rejected a similar attempt by another RTO applicant to limit its liability. Therein, the Commission pointed to Order No. 888

[5] *Transmission Access Policy Study Group v. FERC*, 225 F.3d 667, at 729 (D.C. Cir. 2000), *aff'd* 122 S. Ct. 1012 (2002).
[6] *Id.*
[7] *GridFlorida LLC, Florida Power & Light Co., Florida Power Corporation, Tampa Electric Co*., 94 FERC ¶ 61,363 (2001) (hereinafter, "*GridFlorida*").

and explained that the "pro forma tariff does not address, and was not intended to address, liability. Rather, . . . transmission providers may rely on state laws, when and where applicable, protecting utilities or others from claims founded in ordinary negligence."[8] The Commission found that "RTO participants have alternatives with respect to liability matters. . . .There is nothing in the pro forma tariff that would preclude those entities from relying 'on the protection of state laws, when and where applicable protecting utilities or others from claims founded in ordinary negligence' or intentional wrongdoing."[9] There is no reason to find differently here.

Nevertheless, in an attempt to justify a departure from this policy, the Applicants have raised a concern that "once unbundled from distribution, and thus removed from state utility tariffs, transmission assets are no longer protected from service interruption liability."[10] They further state that "RTOs, ISOs and transmission-only companies ("transcos") are solely regulated by FERC for all aspects of their provision of transmission services"[11] and that entities such as ATCLLC and MISO are "wholly federally regulated public utilities."[12]

These statements are unsupported. The utilities' transfer of functional control over transmission facilities to RTOs does not constitute the "transmission assets" being "unbundled from distribution" as the Applicants assert. In Illinois, for example, "transmission assets" have not been removed from "state utility tariffs." Section 16-103(c) of the Illinois Public Utilities Act ("PUA") states,

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[8] Id., at 62,334; *see Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities and Reocvery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, FERC Stats & Regs. ¶ 31,036 (1996), order on reh'g Order No. 888-A, FERC Stats. & Regs. ¶ 31,048 (1997), order on reh'g, Order No. 888-B, 81 FERC ¶ 61,248, at 30,300-01 (1997), order on reh'g, Order No. 888-C, 82 FERC ¶ 61,046, at 62,080-81 (1998), *aff'd in relevant part sub nom. Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom. New York, et al. v. FERC,* 122 S. Ct. 1012 (2002).
[9] *GridFlorida* at 62,334.
[10] Transmittal Letter at page 3.
[11] *Id.*
[12] Transmittal Letter at page 2.

> Notwithstanding any other provision of this Article, each electric utility shall continue offering to all residential customers and to all small commercial retail customers in its service area, as a tariffed service, bundled electric power and energy delivered to the customer's premises consistent with the bundled utility service provided by the electric utility on the effective date of this amendatory Act of 1997.

In addition, although Illinois' PUA requires utilities in Illinois to offer "delivery service" unbundled from the provision of power and energy, "delivery service" is specifically defined in Illinois law to include both distribution and transmission.[13] Furthermore, the ICC disagrees with the Applicants' assertion that "entities such as ATC" are "wholly federally regulated public utilities." The ATCLLC is an entity in whom the utility members that are comprehensively state regulated utilities continue to hold significant ownership interests. Similarly, the transmission-owning members of Midwest ISO continue to be state regulated and have only transferred functional control over transmission assets that continue to be owned and operated by the traditional utility.

Moreover, FERC does not have "exclusive jurisdiction" over the provision of transmission service as applicants contend.[14] For example, Section 8-406 of the Illinois PUA provides for expansive Illinois jurisdiction over transmission siting and certification issues. Section 16-125 of the Illinois PUA comprehensively addresses reliability standards and reporting requirements that cover both distribution and transmission service. Furthermore, Illinois utilities are required to continue to provide bundled retail service, which includes all aspects of service including transmission (see e.g., PUA Section 16-103), and the ICC rules and tariffs establish standards for the provision of service, which includes transmission (see, e.g., Part 411 of the Illinois Administrative Code).

[13] Illinois PUA Section 16-102.
[14] *See* Transmittal Letter at 2 and 3.

The Applicants state that, because of the alleged unbundling of "transmission assets" from "distribution", "transmission assets are no longer protected from service interruption liability."[15] The Applicants also state that, "any protections that were afforded to the provision of transmission service, by virtue of the transmission service being bundled with retail service under state tariffs, are no longer available."[16] However, there is no evidence to support these assertions. Applicants have not demonstrated that the establishment of organizations such as ATCLLC and the Midwest ISO has had any effect, whatsoever, on the traditional state-level approach for dealing with service interruption liability. State legislatures and state regulators have, over the years, established a comprehensive framework for regulating all aspects of utilities' retail service. That framework has not meaningfully changed. If there has been any change, it has been merely that the traditional utilities have entered into business arrangements with ATCLLC and the Midwest ISO to act as their agent for exercising functional control over transmission facilities that the traditional utilities continue to retain ownership interests in and, for the most part, continue to operate. That small change in the comprehensive regulatory framework for retail regulation is not sufficient to undo the rules and processes historically established by state authorities to address service interruption issues.

The Applicants state:

> Before the issuance of Order No. 888, most FERC-regulated (*i.e.*, transmission-owning) public utilities were actually only regulated by FERC for a small portion (perhaps 10% or less) of their overall business. The majority of their service activities were governed under state tariffs, including the transmission portion of bundled retail service.[17]

The ICC believes that, for the purposes of addressing the service interruption liability issue, nothing, or very little, has changed. Traditional utilities still provide, as they traditionally have

[15] Transmittal Letter at page 3.
[16] Transmittal Letter at page 3.
[17] Transmittal Letter at page 2-3.

provided, some wholesale services for which FERC still has authority to establish service interruption liability standards (Applicants estimate this to be 10% or less of utility business). However, most of the business of traditional public utilities remains under the comprehensive regulatory framework established over the years by state legislatures and state regulators. That portion of traditional public utility service for which comprehensive state regulation still applies includes continued responsibility over service interruption issues and service interruption liability.

The Applicants state that the request for limitation of liability "would apply in the narrow circumstance of the provision of services under the OATT (which would not include limiting liability for injuries to persons or damage to property not occurring in connection with services provided under the OATT)."[18] This statement does not contribute any clarity to the issue of service interruption liability. The Midwest ISO is legally responsible only for exercising "functional control" over the transmission facilities that, at least with respect to Illinois utilities, continue to be both owned and operated by the traditional state-regulated utilities. To the extent that the Midwest ISO's exercise of functional control extends to directing a traditional utility to operate transmission facilities in a particular way, the Midwest ISO is performing that function merely as the agent of the traditional utility. That is, by entering into the contract known as the Midwest ISO Transmission Owners' Agreement, a public utility authorizes the Midwest ISO to act as its "functional control" agent, rather than continuing to exercise "functional control" within the utility (as was traditionally the case). The creation of this agency relationship tied to the contractual transfer of functional control to the Midwest ISO does nothing to change the traditional framework for service interruption liability. Consequently, the Midwest ISO's performance of "services under the OATT" is merely the Midwest ISO's exercise of functional

[18] Transmittal Letter at page 2.

control over the transmission system. Therefore, the responsibility for liability arising "in connection with services provided under the OATT" should continue to fall on the parties on whom it traditionally fell. Creation of institutions such as ATCLLC and the Midwest ISO should have no effect on locus of this liability.

The Applicants state, "The proposed provisions are intended to recapture the liability limitation protections that were lost when the transmission assets were transferred to an entity with only a FERC service tariff."[19] However, as the ICC has demonstrated above, no transmission assets were transferred to the Midwest ISO. Transmission-owning utilities have authorized the Midwest ISO to exercise only functional control over transmission facilities that continue to be owned and operated directly by the traditional utilities or indirectly by the traditional utilities through affiliated entities such as ATC. In either event, no liability limitation protections were lost and the Applicants' filing is unnecessary.

Similarly, the Applicants state, "There are many kinds of actions for which a transmission owner/operator can be held liable."[20] However, the Midwest ISO is neither an owner nor an operator of transmission facilities. As stated above, the Midwest ISO merely exercises, as an agent, some degree of functional control over the transmission facilities owned and operated by the traditional utilities or their operating agents (entities such as ATCLLC). Accordingly, the operations risks that the filing seems to be concerned with do not apply to the Midwest ISO.

Finally, the Applicants state, "In the case of federally regulated entities, state tariff liability limitations for the provision of service will no longer be available unless FERC acts" and "[t]he transfer of ownership and/or operation of transmission assets to entities that do not

[19] Transmittal Letter at page 5.
[20] Transmittal Letter at page 13.

provide retail service strips these entities of any remaining liability protection."[21] The ICC disagrees with these Applicants' conclusory statements as argued above.

B. The Proposed Changes Impose Excessive Limits on Transmission Owners' Liability.

Even if Applicants' arguments concerning jurisdiction and industry restructuring changes are accepted, those arguments do not establish a basis for granting the relief requested on behalf of transmission-owning Midwest ISO members in proposed Midwest ISO OATT sections 10.3(a), 10.3(b), 10.3(c), and 10.4(a). At a minimum, the Applicants' have not established a basis for granting the requested relief to transmission-owning Midwest ISO members that are traditional utilities, i.e., not fully divested independent transmission companies.

Applicants' proposed Section 10.3(a) states,

> (a) Except as provided in Section 10.4, the Transmission Owner shall not be liable, whether based on contract, indemnification, warranty, tort, strict liability or otherwise, to any Transmission Customer, User, or any third party or other person for any damages whatsoever, including, without limitation, direct, incidental, consequential, punitive, special, exemplary or indirect damages arising or resulting from any act or omission in any way associated with service provided under the Tariff, including, but not limited to, any act or omission that results in an interruption, deficiency or imperfection of service, except to the extent that the Transmission Owner is found liable for gross negligence or intentional misconduct, in which case the transmission owner will not be liable for any incidental, consequential, punitive, special, exemplary or indirect damages. Nothing in this section, however, is intended to affect obligations otherwise provided in agreements between the Transmission Provider and transmission owner.

This language would limit all transmission-owning utilities' liability for "any act or omission in any way associated with service provided under the Tariff [Midwest ISO OATT]." In other words, the provision exempts Transmission Owners from their own negligence or the negligence of others, including Midwest ISO, provided that the actions are "associated with service provided

[21] Transmittal Letter at page 6.

under the Tariff [Midwest ISO OATT]." Instead, it imposes on a Transmission Owner liability solely for the direct consequences of its own gross negligence or intentional misconduct. The ICC believes that this is improper in that it would bring into question existing state-level provisions applicable to state regulated utilities' service liability. As explained above, state legislators and state regulators have put in place over the years a comprehensive framework for regulating public utilities. In particular, state level provisions address service quality and service interruption liability matters. No aspect of the current electric industry restructuring, or the establishment of the Midwest ISO or entities like ATCLLC, has altered this state regulatory framework. In addition, even though Applicants argue that they are not attempting "to limit liability any more than allowed by most states,"[22] Applicants have not demonstrated that the liability level for transmission-owning utilities that would result from adoption of Section 10.3(a) is equivalent to that traditionally applicable to each transmission-owning utility under state-level provisions. Accordingly, for these additional reasons, proposed Section 10.3(a) should be rejected by the Commission.

Proposed Section 10.3(b), has the further effect of limiting the liability of the transmission-owning utilities. The expansive language of Section 10.3(b) places responsibility on the Midwest ISO for any act or omission "in any way associated with service provided under the Tariff." The term "in any way associated with" is unlimited and could include almost any act committed by any person (including, potentially, transmission owners). Section 10.3(b) then goes on to completely exempt the Midwest ISO from all liability flowing from this responsibility, except for the direct consequences of gross negligence or intentional misconduct. The ICC believes that this proposed language further improperly extends the liability protection of transmission owners and thus should be rejected.

[22] Transmittal Letter at page 35.

The ICC is similarly concerned with the language of Applicants' proposed Section 10.3(c) that states:

> (c) Neither the Transmission Owner nor the Transmission Provider shall be liable for damages arising out of service provided under the Tariff, including, but not limited to, any act or omission that results in an interruption, deficiency or imperfection of service, occurring as a result of conditions or circumstances beyond the control of the transmission owner or as a result of electric system design common to the domestic electric utility industry or electric system operation, practices or conditions common to the domestic electric utility industry. Transmission Owner shall not be liable for acts or omissions done in compliance or good faith attempts to comply with directives of the Transmission Provider.

These service interruption liability matters are already addressed for traditional public utilities through comprehensive state-level regulation.

Finally, proposed Section 10.4(a) would expose transmission-owning Midwest ISO members to liability in the amount of "the greater of $500,000 or 0.0025 of Transmission Owner's annual revenue from the use of its transmission system" for each incident of negligence. This proposed section should also be rejected. The Applicants have made no effort to demonstrate that this provision exposes transmission owners to a level of liability equivalent to that which they were exposed to under traditional state-level authority, nor have they sufficiently demonstrated or justified a need to change the present level of liability exposure. The Applicants state, "ATCLLC and the Midwest ISO believe that the proposed tariff provisions represent a necessary addition to the Midwest ISO's tariff for the benefit of federally regulated utilities."[23] The ICC disputes this contention as explained above. However, even if the Commission were to accept this contention, Applicants have presented no support for their proposal with respect to the traditional utility transmission owners. Accordingly, proposed Sections 10.3(a), 10.3(b), 10.3(c) and 10.4(a) should be rejected.

[23] Transmittal Letter at page 6.

C. Any Proposed Change to the Liability Standard Must be Accompanied by Appropriate Service Delivery Reliability Standards.

While the Applicants have not justified a need to change the present liability standard, to the degree that the Commission were to consider such a change, any change must, at a minimum, be considered in conjunction with proper service quality standards. The June 5th filing lacks any meaningful discussion of standards for transmission service reliability. The Applicants raise the issue briefly only to argue that unless liability is limited, incentives will be created to "over-build the transmission system (or under-utilize portions) to avoid service interruptions."[24] However, this statement is not helpful in a service standard vacuum such as that created by the Applicants' present proposal. The fact is that if liability for poor service is limited as the Applicant's propose, then incentives would be created to under-build the transmission system or over-utilize portions of it.

The Applicants argue that "no limitation of liability means higher rates."[25] This is a spurious argument. For example, the service provider's costs to provide lesser service are likely to be low, and the rates for that service will likewise probably be relatively low. Whereas, if the service provider's liability were limited, rates may stay low, but consumers may not be getting reliable service. Moreover, there would be no direct incentive for the service provider to provide better service. If the service provider's liability remains at the present level and the service provider is expected to provide very reliable service, on the other hand, then the service provider would either need to invest in facilities so as to provide that very reliable service or purchase insurance to cover the cost of resulting lawsuits. Rates would likely be higher in this instance, but consumers would be receiving a higher level of service. What this hypothetical description illustrates is that limitations of liability are best considered in association with the establishment

[24] Transmittal Letter at page 7.
[25] Transmittal Letter at page 19.

of proper service standards. Given that the Applicants' filing is almost entirely bereft of service standards discussion, the Applicants' proposed liability limiting changes should be dismissed.

State regulators have, over the years, developed comprehensive power delivery service standards which must not be compromised. The ICC, in particular, has adopted detailed rules in 83 Illinois Administrative Code Part 411 for electric service delivery standards. For example, Section 411.140(b) (4) states,

> The jurisdictional entity shall strive to provide electric service to its customers that complies with the targets listed below.
>
> A) Customers whose immediate primary source of service operates at 69,000 volts or above should not have experienced:
>
> i) More than three controllable interruptions in each of the last three consecutive years.
>
> ii) More than nine hours of total interruption duration due to controllable interruptions in each of the last three consecutive years.
>
> B) Customers whose immediate primary source of service operates at more than 15,000 volts, but less than 69,000 volts, should not have experienced:
>
> i) More than four controllable interruptions in each of the last three consecutive years.
>
> ii) More than twelve hours of total interruption duration due to controllable interruptions in each of the last three consecutive years.
>
> C) Customers whose immediate primary source of service operates at 15,000 volts or below should not have experienced:
>
> i) More than six controllable interruptions in each of the last three consecutive years.
>
> ii) More than eighteen hours of total interruption duration due to controllable interruptions in each of the last three consecutive years.

The ICC is concerned that the Midwest ISO has not provided or disclosed any particular standard for service reliability, much less one that would be equivalent to the standards established in Illinois. As shown above, in the absence of established service delivery reliability standards for the Midwest ISO, there is no basis for analyzing or establishing liability limitation levels.

Applicants state, "Protection from acts of their own negligence is necessary for liability limitation provisions to be effective in shielding utilities from the harm of being exposed to tort liability."[26] However, the ICC believes that negligence that brings service delivery quality below a particular level is unacceptable. Applicants' witness Sally Hunt reinforces the notion of a need to achieve a target level of performance. She states,

> the provider knows more about the risk of outages, and so does the regulator. So this level should be established as a target, made known to the customers so that they have information about the appropriate amount to spend on mitigation, and the utility should be disciplined for failing to meet the target.

Hunt Exhibit 2, at page 12.

Applicants' witness Hunt also states that "There has to be a single (regulatory) decision about reliability" and "there should be some discipline on the utilities to provide reliable service." Hunt Exhibit 2 at page 4 and 11. However, in the June 5th filing, Applicants are seeking expansive limited liability for negligence by both the Midwest ISO and the transmission-owning Midwest ISO members, without setting any reliable service standards. At a minimum, therefore, the Commission should not entertain such liability limitation requests in the absence of acceptable service quality standards.

[26] Transmittal Letter at page 13.

D. If the Commission Addresses the Service Liability Issue, it Should Only do so in a Rulemaking Context.

Applicants' witness Hunt argues that exposing transmission providers to unlimited tort liability is not the best way for regulators to induce transmission providers to provide the proper level of service reliability.[27] Even so, Ms. Hunt does not describe in her testimony what is the "best way for regulators to induce transmission providers to provide the proper level of service reliability." She does state, however, that, "after restructuring and the introduction of standard market design, and transparent market prices, it will be possible to introduce more precise incentives into regulation."[28] She also briefly describes the role of financial transmission rights ("FTRs") in this regard.[29]

The ICC believes that the relationship between the liability limitation relief sought by Applicants in the instant docket and the superior incentive mechanisms alluded to by Ms. Hunt in her testimony requires clarification. However, if the Commission were to address these issues, it would be more appropriate to do so in the context of a rulemaking. All industry stakeholders would then have the opportunity to participate. If such a rulemaking were to take place, it should be after the Commission adopts a standard market design in Docket. No. RM01-12.

[27] Hunt Exhibit 2 at page 4.
[28] Hunt Exhibit 2 at page 4.
[29] Hunt testimony at pages 13-16.

IV. CONCLUSION

WHEREFORE, for all of the reasons explained above, the ICC recommends that the Commission deny the Applicants' liability limitation proposals in their June 5th filing.

Respectfully submitted,

/s/ Christine F. Ericson

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ILLINOIS COMMERCE COMMISSION

Dated: July 2, 2002

CERTIFICATE OF SERVICE

I hereby certify that I caused copies of the foregoing document of the Illinois Commerce Commission to be served this day upon each person designated on the official service list compiled by the Secretary in this proceeding, a copy of which is attached, in accordance with the requirements of Rule 2010 of the Commission's Rules of Practice and Procedure.

Dated at Chicago, Illinois, this 2nd day of July, 2002.

/s/ Christine F. Ericson

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